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In the Supreme Court
OF THE
United States

October Term, 1957

No. 303

ALASKA INDUSTRIAL BOARD and CARL E.

JENKINS,

Petitioners,

VS.

CHUGACH ELECTRIC ASSOCIATION, INC.,
a corporation, and GENERAL ACCI-
DENT, FIRE AND LIFE ASSURANCE COR-
PORATION, LTD., a corporation,

Respondents.

On Writ of Certiorari to the United States Court of Appeals
for the Ninth Circuit.

BRIEF FOR THE RESPONDENTS.

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Respondents.

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BRIEF FOR THE RESPONDENTS.

OPINIONS BELOW.

The opinion of the Court of Appeals (R. 85-104) is,
reported at 245 F.2d 855. The opinion of the District
Court (R. 56-60) is reported at 122 F. Supp. 210,
15 Alaska Reports 97.

JURISDICTION.

The judgment of the Court of Appeals was entered on April 29, 1957 (R. 104-105). The Petition for Writ of Certiorari was filed July 22, 1957, and was granted on October 14, 1957. The jurisdiction of this Court is asserted by Petitioners under Title 28, U. S. Code, §1254(1), but Respondents question jurisdiction in this case.

STATUTES INVOLVED.

This case involves the construction of certain sections of the Alaska Workmen's Compensation Act (Appendices A and B), namely: Sections 43-3-1, 43-3-4, 43-3-22 and 43-3-29 (Appendix pp. 10, 17, 37, 44).

QUESTIONS PRESENTED.

While the question presented in the Petition for Writ of Certiorari (p. 2) is in the identical language as stated in Petitioners' Brief (pp. 2-3), it should be more fairly stated as:

Under the Alaska Workmen's Compensation Act is an employee, who suffers total permanent disability and is awarded and paid compensation therefor, entitled to be paid temporary disability compensation for a period following from and after the date that he suffers total permanent disability, for an injury that he suffered at the same time and in the same accident wherein he suffered total permanent disability and evidence whereof was before the Alaska Industrial

Board at its hearing which resulted in awarding total permanent disability compensation (R. 46).

Respondents believe they are also entitled to present the question of lack of jurisdiction, namely:

This Court has no jurisdiction because the Alaska Industrial Board was without jurisdiction to make its decision of January 8, 1954 (R. 52).

STATEMENT.

With respect to the ten numbered paragraphs of Petitioners' Statement (Pet. Brf. pp. 3-7), Respondents either agree or urge modification as follows:

1. Respondents agree.
2. Respondents agree.
3. Petitioners omitted to state that Respondents also paid hospital and medical benefits of \$15,204.78 (R. 38, 57) for more than the statutory period required (R. 59).
4. Respondents did not reverse their position July 25, 1951, but on that date, upon advice of counsel (R. 54), they recognized Jenkins was entitled to permanent total disability compensation of \$8,100.00 and paid it (R. 44), which payment was modified by the Full Board's award of February 6, 1953 (R. 46-47), to require also the payment of temporary disability compensation of \$476.70 for the period from September 21, 1950, to October 28, 1950, which award was sustained by the District Court (R. 56-60).

5. Respondents submit that Jenkins did not apply to the Alaska Industrial Board for temporary disability, but by his amended application of August 14, 1951 (R. 39-40), merely requested a hearing with respect to the amount owed.

6. Respondents submit that this paragraph should be amended to also show that Jenkins was allowed *and paid* \$476.70 (R. 54) as temporary disability compensation for the period of 35 days from September 22, 1950, the date after the accident until the day before his operation on October 28, 1950, on which date the Full Board held he sustained total permanent disability (R. 46-47).

7. This statement correctly should read: The matter came on for hearing again pursuant to the Application (R. 48-49) of Jenkins and the Board reversed (R. 52) its prior action of February 6, 1953 (R. 46-47), and the Board on January 8, 1954, held that "a condition of temporary total disability existed on October 28, 1950, and continues to this date, no end medical result having been reached." (R. 52). This meant that under that decision Jenkins was entitled to temporary disability compensation at the rate of \$95.34 a week from October 28, 1950, until January 8, 1954.

8. Respondents agree.

9. This statement should be amended to include that on April 29, 1957, the Court below (R. 97) upheld the ruling of the District Court (R. 56-60), except to modify the latter's decision by holding that the temporary disability compensation of \$3645, paid by Re-

spondents to Petitioner Jenkins prior to July 25, 1951, should not have been deducted from the \$8100 that was paid (R. 44), although the Court below (R. 95) held that total and permanent disability occurred on October 28, 1950, and that the deduction question was not presented in the trial court or argued in the briefs (R. 97). The third sentence of this statement should be modified by inserting after "total permanent disability" the phrase "under that section of the statute which requires that such injuries shall constitute total and permanent disability and be compensated according to the provisions of the Act with reference to total and permanent disability.'" (Appendix, p. 11).

10. Respondents agree with the statement, but not with the conclusion of the dissenting opinion.

ARGUMENT.

The Alaska Workmen's Compensation Act, herein-after designated as "the Act," (Sections 43-3-1 through 43-3-39, ACLA 1949, as amended by Ch. 104, SLA 1949, [Appendices A and B, pp. 1 to 53]), which was in effect at the time of the accident on September 21, 1950, but which was subsequently further amended by Ch. 60, SLA 1953, effective June 24, 1953, and Ch. 141, SLA 1955, effective June 27, 1955, but which are not pertinent, not having been in effect at the time of the accident.

**COMPENSATION, UNDER ACT, IS BASED UPON
LOSS OF EARNING POWER.**

The Act does not deviate from or indicate any purpose other than to comply with the principle that compensation is based upon loss of earning power, as early announced by this Court.¹

CLASSES OF DISABILITY ENTITLED TO COMPENSATION.

Other than for death, the Act prescribes compensation for five classes of disabilities:

1. Total and permanent disability (Appendix, p. 6).
2. Partial permanent disability, fixing specified sums for loss of specified members (Appendix, pp. 7-10).
3. Disfigurement (Appendix, p. 10).
4. Temporary disability (Appendix, pp. 10-11).
5. Other permanent partial injuries (Appendix, pp. 11-12).

Possibly, accuracy requires one more classification, viz.: injury causing total permanent disability when combined with previous disability (Appendix, p. 14).

The Act contains no blanket provision, such as: "or any other injury which totally incapacitates the employee from working at an occupation which brings him an income, shall constitute total disability."²

¹*New York Central R. Co. v. White*, 243 US 188, 202, 61 L.ed 667, 674.

²Minnesota statute, quoted in *Olson v. Griffin Wheel Co.*, 15 NW 2d 511, 156 ALR 1343.

The Act does provide: "The loss of both hands, or both arms, or both feet, or both legs, or both eyes, or any two thereof, or hearing in both ears, shall constitute total and permanent disability and be compensated according to the provisions of this Act with reference to total and permanent disability." (Appendix, p. 11).

Beneficiaries of compensation because of an injury to an employee are classified:

- (a) Married employee with wife and one or more children (App. p. 6).
 - (b) Father or mother of unmarried and childless employee (App. p. 7).
 - (c) Father and mother of employee (App. p. 7).
 - (d) Minor children of widowed or divorced employee (App. p. 7).
 - (e) Unmarried employee without wife, children, father or mother (App. p. 7).
-

**PETITIONER JENKINS, MARRIED WITH ONE CHILD UNDER 18 YEARS, AT TIME OF ACCIDENT ON SEPTEMBER 21, 1950,
TOTAL AND PERMANENT DISABILITY COMPENSATION.**

Petitioner Jenkins at the time of his injury on September 21, 1950, was married and had one child (R. 36); hence, under subsection (a), supra (App. p. 6), he was entitled to be and was paid compensation of \$8,100.00 (R. 44); also temporary disability compensation of \$476.70 (R. 54); also, his medical, surgical, and hospital expenses of \$15,204.78 (R. 31 and R. 57), were paid by Respondents.

Respondents do not agree with the Appellate Court's theory (R. 95) that they were not entitled to deduct from or credit upon the \$8,100.00 total, permanent disability compensation the \$3,645 theretofore paid by them prior to July 25, 1951, as temporary disability compensation, but presumably, unless this Court dismisses this appeal for lack of jurisdiction, they must and will pay that \$3,645, should the Appellate Court's opinion not be reversed or modified, inasmuch as Respondents did not present that matter to this Court by writ of certiorari.

**BASIC THEORY OF SCHEDULE-TYPE COMPENSATION
IS BASED UPON LOSS OF EARNING CAPACITY.**

Schedule type compensation, such as the Act prescribes for total and permanent disability (Appendix, p. 6), and partial permanent disability (Appendix, pp. 7-10), and disfigurement (Appendix, p. 10), and other permanent partial injuries (Appendix, pp. 11-12), however, are not "to be interpreted as an erratic deviation from the underlying principle of compensation law—that benefits relate to loss of earning capacity and not to physical injury as such. The basic theory remains the same; the only difference is that the effect on earning capacity is a conclusively presumed one, based on observed probabilities in many similar cases, instead of a specifically proved one, based on the individual's actual wage-loss experience."³ (Emphasis supplied.)

³Larson's Workmen's Compensation, Vol. 2, 1952, §58.10, p. 42.

It is true that compensation for temporary disability is computed upon loss of daily average wages (Appendix, p. 10), and that compensation for total and permanent disability (Appendix, p. 6), partial permanent disability (Appendix, pp. 7-10), disfigurement (Appendix, p. 10), and other partial permanent disability (Appendix, pp. 11-12) is fixed in lump sums regardless of the amount of daily average wages, so long as it is some amount of wage, yet the compensation in each instance is awarded upon the principle that the employee by reason of the disability has suffered loss of earning capacity, or loss of wages, actual or presumed.

The United States Court of Appeals for the Ninth Circuit in this suit said: "Lump-sum payments for permanent total disability, on the other hand, are intended to represent capitalization of future earnings," (R. 97) and also said: "The basic principle of all workmen's compensation laws is that benefits relate to loss of earning capacity and not to physical injury" (R. 93). Thus, that Court also took the position that compensation under the Act is based upon loss of earning power, or loss of wages.

Petitioners, however, nonetheless distort (Petitioners' Br. p. 17), as they did in the Appellate Court, the Act's intention and meaning into basing compensation upon loss of earning capacity or loss of wages only in the case of temporary disability (Appendix, pp. 10-11), and upon physical injury and not upon loss of earning capacity or loss of wages in case of total and permanent disability (Appendix, p. 6), partial

permanent disability (Appendix pp. 7-10), disfigurements (Appendix, p. 10), and other partial permanent disability (Appendix, pp. 11-12).

The Act does not provide that the employer shall pay for all injuries that an employee may suffer, but only for those injuries that disable him in his earning capacity. No compensation is payable for an injury that does not actually or presumptively disable the employee from working.⁴

The Act⁵ provides: "All compensation allowed hereunder for *temporary disability* shall be paid periodically and promptly in like manner as wages, . . ."; also,⁶ "No compensation shall be paid hereunder for any injury *which does not incapacitate the employee from earning full wages* for a period of at least one day in addition to the date on which the injury occurred . . ." (Emphasis supplied.)

Compensation for total and permanent disability is based upon total permanent disability.⁷

Compensation for partial permanent disability is based upon partial permanent disability.⁸

Compensation for permanent partial injuries is based upon partial, permanent disability, and upon loss of earning capacity.⁹

⁴Temporary disability, Appendix p. 10; Loss of Members as Permanent Disability, Appendix, p. 11.

⁵Sec. 43-3-3, ACLA 1949, Appendix, p. 16.

⁶Sec. 43-3-8, ACLA 1949, Appendix, p. 21.

⁷Appendix, p. 6.

⁸Appendix, p. 7.

⁹Appendix, pp. 11-12.

Nowhere does the Act prescribe that a "medical end result" must occur to terminate the period of disability.

Temporary disability terminates in two ways, either by return of earning capacity, or by resulting in permanent disability, either total or partial.

Disfigurement¹⁰ is the only class of injury which the Act does not specifically base either upon disability or loss of earning capacity. It does provide that the disfigurement must be *serious*. (Emphasis supplied.) Even so, the disfigurement to be compensated should be so serious as to be presumptive that it will result in loss of earning capacity.

Professor Larson says: "*So deep-rooted, then, is the earning capacity principle in compensation law, that even under statutes defining disfigurement broadly*" (which the Act does not do) "*as any loss of or injury to a member not otherwise compensated for, the statute should not be read as extending to injuries which cannot be presumed to affect earning capacity at any time in the future.*"¹¹ (Emphasis supplied.) Also: "*Although this kind of extension may be appealing because it lessens somewhat the harshness of the workmen's complete loss of remedy for industrial disfigurement, it cannot be accommodated to the underlying theory of compensation as described in the first chapter. If compensation for disfigurement is confined to disfigurement which presumably interferes with obtaining and retaining employment, it of course*

¹⁰ Appendix, p. 10.

¹¹ Larson's Workmen's Compensation, Vol. 2, §58.32, p. 51.

*fits within that theory; but, when it goes beyond, it is time to inquire where the process is going to stop, once the accepted test of interference with earning capacity is abandoned.”*¹² (Emphasis supplied.)

The whole concept of the Act is that all compensation; even for disfigurement is based upon loss of earning capacity, not upon injury.

The Appellate Court (R. 93) refuted Petitioners' contention that compensation was based on injury, not on loss of earning capacity.

The Appellate Court did not unqualifiedly hold “that if a man loses two limbs in an industrial accident, and thus becomes at once entitled to the maximum scheduled award for total and permanent disability, he is ‘conclusively presumed’ to have no remaining ability to work,” (Petitioners' Brief, p. 8), but restricted the presumption not only to the act itself but also to the particular accident, saying: “The individual receiving such an award may actually be able to continue some work, and hence he is, in fact, not totally and permanently disabled. But the fact that some ability to work remains is not to be taken into account in determining whether such an individual is entitled to the lump-sum award.” (R. 93-94), also: “The award for total permanent disability resulting from loss of members is thus intended as a maximum award for disability resulting from injuries received in an accident.” (R. 94.)

¹²Larson's Workmen's Compensation, Vol. 2, §65.30, p. 139.

Admittedly Petitioner Jenkins' left foot, for which he now claims temporary disability, was injured in the same accident for which he was awarded and paid total permanent disability compensation (R. 39, 42, 48).

The text of Professor Larson's work¹³ that Chief Judge Denman (R. 101) seemingly holds does not support the Appellate Court's (R. 93) holding that "in case of loss of certain members, total and permanent loss of earning power is conclusively presumed for the purpose of awarding compensation under the Act," is based upon specific provisions in the New York Act¹⁴ which nowhere appear in the Alaska Act.

**TERM "TOTAL TEMPORARY DISABILITY" NOT CONTAINED
IN ACT IN EFFECT ON SEPTEMBER 21, 1950.**

The Act nowhere classifies "total temporary disability" as being entitled to compensation.¹⁵ It is "temporary disability," regardless of degree, but which causes loss of capacity of earning full wages for a period of at least one day in addition to the day on which the injury occurs, that entitles the injured employee to compensation (§43-3-1, Appendix, p. 10; §43-3-8, Appendix, p. 21).

Not until the enactment of Chapter 60, SLA 1953, which became effective on June 24, 1953, whereas the Jenkins accident occurred on September 21, 1950, was

¹³Larson's Workmen's Compensation Law, §58.10, p. 43, Vol. 2.

¹⁴New York W.C.L., § 15, subsection 4-a. Appendix C, p. 54.

¹⁵Petitioners' Br., p. 6.

the term "temporary total disability" inserted in the Act by the sentence: "Such compensation for temporary total disability shall not exceed the sum of \$75 per week and such period of temporary total disability shall not exceed 24 months from and after date of injury." §43-3-1(E).¹⁶ Chapter 141, SLA 1955, effective June 26, 1955, amended that section by changing \$75 to \$100, as the maximum weekly compensation for temporary total disability.

The Appellate Court and, of course, it was speaking of the Act as in effect at the time of the accident on September 21, 1950, said: "If an injury which causes 'temporary' disability thereafter develops or proves to be a 'total' disability, it is no longer a 'temporary' disability" (R. 95).

Plainly the Act would award compensation to Petitioner Jenkins should he sustain temporary disability from earning capacity had his left foot been injured in another or subsequent accident, but not in the same accident for which he was awarded and paid permanent total disability compensation. Here Petitioner Jenkins seeks to recover for temporary disability for an injury sustained in the same accident by which he sustained permanent total disability and for which he was awarded and paid total permanent disability compensation of \$8,100.00 (R. 40). Both the trial Court (R. 59) and the Appellate Court (R. 95) said he was not entitled to so recover and based it on that very ground.

¹⁶Appendix D, pp. 55-56.

¹⁷Appendix E, pp. 57-58.

PETITIONER JENKINS SEEKS TO RECOVER TEMPORARY DISABILITY COMPENSATION FOR A PERIOD SUBSEQUENT TO HIS SUFFERING TOTAL, PERMANENT DISABILITY ON OCTOBER 28, 1950, FOR WHICH HE WAS AWARDED AND PAID TOTAL, PERMANENT DISABILITY COMPENSATION—AND BECAUSE OF AN INJURY SUSTAINED IN THE SAME ACCIDENT ON SEPTEMBER 21, 1950, FOR WHICH HE WAS AWARDED TOTAL, PERMANENT DISABILITY COMPENSATION.

Petitioners seek to return to a status of "temporary disability," after adjudication as of October 28, 1950, of "total permanent disability" (R. 47) and after having been paid compensation therefor of \$8,100.00 plus temporary disability compensation of \$476.70 (R. 47, 51), and also in effect having been awarded by the Appellate Court (R. 95) temporary disability compensation of \$3,645.00, which has not been paid but which Respondents must pay should that Court's decision stand, inasmuch as Respondents have taken no appeal therefrom, or temporary disability compensation of \$4,121.70 for temporary disability prior and up to the date of his total permanent disability and \$8,100.00 for total permanent disability compensation, making total compensation of \$12,221.70 plus more than \$15,000.00 for medical, surgical and hospital expense compensation (R. 57), actually \$15,204.78 (R. 31).

Petitioners' thesis is that Petitioner Jenkins should be paid, notwithstanding his adjudication as of October 28, 1950 (R. 46-47) of total and permanent disability, for which he has been paid, temporary disability compensation commencing with October 29, 1950 (R. 52), and thenceforth as long as such temporary disability might continue, even throughout his

life; in fact, his application for adjustment of claim (R. 49) states "until there is an end of disability," although now he minimizes that claim by stating he returned to work for Chugach Electric Association in January, 1955 (Petitioners' Brief, page 21).

As heretofore stated, should Petitioner Jenkins be accidentally so injured as to suffer disability of earning capacity in this subsequent work that he has undertaken for Respondent Chugach Electric Association he would be entitled to compensation therefor because it would occur in a different accident than the accident of September 21, 1950, for which he was awarded and paid total permanent disability compensation of \$8,100.00, plus temporary disability already paid or possibly payable of \$4,121.70 (R. 47, 51, 95).

Respondents challenge the correctness of what Petitioners call the "harsh result" (Petitioners' Br. 24) of the Appellate Court's interpretation (R. 93-95) of the Act. As hereinbefore pointed out, that Court said that ability might still continue to do some work, and restricted its interpretation to disability arising out of one particular accident (R. 93); here, the accident of September 21, 1950.

Respondents concede the general rule that workmen's compensation laws are to be liberally construed, but submit

"There are, however reasonable limitations upon the rule of liberal construction. It may not be extended so far as to evade the plain intent or to deny the clear mandate of the statute, nor should the operation of the law be stretched by any extravagant principle of inclusion. The

courts have no power to extend its provisions to cases not fairly within its scope or to deny its application to those that are, and may not attempt by construction of the statute to develop a more comprehensive or more logical system of compensation than that which was in fact enacted. The humane spirit of the statute does not warrant its extension beyond its legitimate scope."

58 *Am. Jur.*, §27, pp. 595, 596, 597.

**APPELLATE COURT'S MAJORITY DECISION IS
NEITHER HARSH NOR UNSOUND.**

The Appellate Court's majority decision (R. 85-97) is neither harsh nor unsound. It is based upon the plain meaning of the Act, except as to the questions of jurisdiction and of the \$3645 deduction.

Respondents do not agree with the Appellate Court's theory (R. 95) that they were not entitled to deduct from or credit upon the \$8100 total permanent disability compensation the \$3645 theretofore paid by them prior to July 25, 1951, as temporary disability compensation, but presumably, unless this Court dismisses this appeal for lack of jurisdiction they must and will pay that \$3645, should the Appellate Court's opinion not be reversed or modified, inasmuch as Respondents did not present that matter to this Court by writ of certiorari.

Certainty is of the essence of workmen's compensation acts: certainty that the employee will be compensated for his loss of earning capacity and of the amount he will receive, and certainty of the employer as to the amount he must pay.

Maximums are necessary to accomplish that certainty for both employee and employer; otherwise, two employees working for the same wages in the same kind of work for the same employer sustaining the same kind of injury might receive different amounts of compensation; otherwise, the employer might be compelled to pay one of those employees a very small amount of compensation and to pay the other as huge a sum as might have been adjudged against him in a tort action, whose risk of unfair damages either for or against an employee or for or against an employer is fundamentally different from the concept of workmen's compensation.

Larson's Workmen's Compensation Law, Vol. 1, (1952), page 4, §2.

Respondents submit that the plain purpose of the Alaska Act is to fix maximum compensations for loss of earning capacity.

Hypothetical situations posed by Chief Judge Denman (R. 99) and by Petitioners (Brief, p. 23) are ineffectual as against the terms of the Act itself, which of necessity to gain certainty of compensation disregard many distinctions, which might be of persuasive weight in a tort action.

Section 43-3-1, subparagraphs 1 through 7, fixes maximum death benefits (Appendix, pp. 3-5). The poor widow receives the same as the rich widow, \$4,500.00. A widow with 5 minor children receives the same as a widow with 10 minor children, \$9,000.00.

An employee suffering permanent total disability who has 5 children receives the same amount as one

who has 2 children. A widower suffering permanent total disability receives the same compensation whether he has 4 children or 10 children.

In each instance the maximum is \$9,000.00. Jenkins was paid \$8,100.00, the maximum permanent total disability compensation because at the time of his injury he had a wife and one minor child.

Maximums are fixed for partial permanent disability.

A temporarily disabled employee regardless of whether single, married, having children or being childless, having parents or being an orphan receives the maximum sum of 65% of his daily average wages.

An employee suffering a permanent partial injury may be entitled to a maximum of \$7,200.00, but no more, regardless of whether single, married, having children, or being childless, having parents or being an orphan.

On September 21, 1950, had Petitioner Jenkins been killed by a third party's negligence outside his employment, his personal representative, despite the vicissitudes of a tort action, could have recovered not more than \$15,000 damages¹⁸ regardless of whether the decedent was intelligent or stupid, cultured or illiterate, rich or poor, of high or low earning capacity, single, divorced, married, with or without children, father or mother.

Posed situations, no matter how exaggerated, could not have got more. Petitioner Jenkins' workmen's

¹⁸Ch. 89, SLA 1949, Appendix F, p. 59.

compensation is likewise subject to the provisions of the Act, not to posed exaggerated situations, not similar to the facts at bar.

LACK OF JURISDICTION TO MODIFY OR ALTER THE ALASKA INDUSTRIAL BOARD'S DECISION AND AWARD OF FEBRUARY 6, 1953 (R. 46).

Under the well settled rule,

"that where the lower Court has acquired no jurisdiction of the subject matter of an action, an appeal cannot confer any jurisdiction on the appellate court, notwithstanding the trial therein is *de novo* and the court would have original jurisdiction of the matter in controversy."

Appeal and Error, 2 Am. Jur. §11, p. 851,

which rule *Corpus Juris Secundum* states:

"An appeal from the decision of an inferior court which has no jurisdiction generally confers no jurisdiction on the Appellate Court,"

Appeal and Error, 4 CJS §41, p. 158,

neither this Honorable Court, the Appellate Court, nor the trial Court, the latter not doing so but to the contrary affirming (R. 56) the decision and award of the Alaska Industrial Board of February 6, 1953 (R. 46), has jurisdiction to modify or alter that decision and award of that Board.

This Court, on an appeal from the Circuit Court of the United States for the Southern District of New York, although a stipulation had been entered into that the decree should follow that of another case, which was affirmed, said:

"But it is now assigned for error that, as defendant and complainants below were citizens of the same State, and the bill did not allege that the trade-mark in controversy was 'used on goods intended to be transported to a foreign country,' Act of March 3, 1881, c. 138, §11, 21 Stat. 502, the Circuit Court had no jurisdiction, and the decree must be reversed for that reason. The objection is well taken, and the decree is accordingly reversed."

Ryder v. Holt, 128 US 525, 32 L.ed. 529.

Also see:

U. S. v. Alamogordo Lumber Co., 202 F. 700 (CCA 8);

Hare v. Birkenfield, 181 F. 825 (CCA 9);

U. S. v. Dickerson, 101 F. Supp. 262.

This lack of jurisdiction was raised by Respondents' Motion and Answer before that Board (R. 50) and before it rendered its decision of January 8, 1954 (R. 52).

Respondents also raised it by their Amended Complaint and Appeal in the District Court (R. 28, 32-35).

The trial Court at least inferentially so held in its Opinion of July 27, 1954 (R. 56-60).

This lack of jurisdiction of the Alaska Industrial Board was before the Appellate Court (R. 28, 46, 50, 56-60). Majority Opinion (R. 85, 88-91).

No gainsaying that the Alaska Industrial Board is not a forum of any higher rank than an inferior court or a county board or other similar tribunal.

Respondents' contention that the Alaska Industrial Board had no jurisdiction to render its decision (R. 52) of January 8, 1954, is based upon three sections of the Act, viz.: "Modification of Compensation; continuing jurisdiction; Effect of review upon moneys already paid; Limitation of time," Section 43-3-4 (Appendix, p. 10); "Award to be final and conclusive; Questions of fact: Injunction proceedings: Certification of questions by Board: Advancement on dock: Early determination: Increase in award," Sec. 43-3-22 (Appendix, p. 37); and "Claims barred if not filed within two years," Sec. 43-3-29 (Appendix, p. 44).

**SECTION 43-3-4, ACLA 1949 DID NOT AUTHORIZE THE HEARING
ON DECEMBER 28, 1953, OR THE BOARD'S DECISION AND
AWARD OF JANUARY 8, 1954.**

Sec. 43-3-4, ACLA 1949, provides:

"Provided, however, no compensation under such increased rate shall be paid unless the disability entitling the employee thereto shall develop and claim be presented within three years after the injury."

The District Court in *Suryan v. AIB*, 12 Alaska 571, 573, F. Supp., said that the Board's continuing jurisdiction for three years to review its decisions and awards is limited solely to the adjustment of the rate of compensation where there is a change in the physical condition of claimant.

The last quotation from §43-3-4 is the last clause in that section and controls all of the preceding language of that section.

That section further conditions the Board's continuing jurisdiction to a higher rate of compensation, by the prior clause therein, namely:

"And it shall afterwards develop that he or she is or was entitled to a higher rate of compensation under same or some other part or subdivision of this schedule, then and in that event he or she shall receive such higher rate, *after first deducting the amount* that has already been paid him or her." (Emphasis supplied.)

Moreover, Petitioner Jenkins' application of November 21, 1953 (R. 48-49), which is more than three years after September 21, 1950, the date of the accident, is specifically based upon the accident of September 21, 1950, by the language: "Injured, left work on 9/21/50, and disability continued to present time," after previously stating therein that he was injured on September 21, 1950, and specifying among his injuries: "badly burned left foot. Four toes on left foot amputated."

Respondents submit that the three years' continuing jurisdiction commences on the date of the injury, and its exercise is limited (a) to the development within three years after the date of injury of the disability for which the increased rate of compensation may be allowed and (b) to the injured employee presenting to the Board his claim therefor within that same three years.

Factually, although Petitioners undoubtedly do not so intend, Petitioner Jenkins seeks a lower rate of compensation, i.e.: temporary disability compensation,

notwithstanding Sec. 43-3-4, supra, covers situations only where, by reason of a disability developing after an award is made, an injured employee becomes entitled to a higher rate of compensation than allowed him by that award. It is inconceivable that Jenkins would agree to, or would refund the \$8,100.00 maximum total permanent disability compensation paid him should Appellees be required to pay to Jenkins total temporary disability compensation in accordance with the Board's decision and award of January 8, 1954 (R. 52).

It is beyond even liberality of logic to be able to deduct a higher sum or amount from a lower sum or amount. Mathematics cannot subtract 12 from 6 and leave a remainder.

But, as seen, Sec. 43-3-4, supra, requires not only entitlement to a higher rate of compensation but also deduction, prior to receiving such higher rate, of the amount that has already been paid.

The trial Court so construed the statute (R. 58-59), and held that the Board may not, after making a finding of permanent total disability, "make a finding of the existence of a lesser degree of disability and allow compensation therefor, because obviously such lesser degree is included in the greater."

That principle has been recognized by the United States Court of Appeals in two previous Alaska Workmen's Compensation cases.¹⁹

¹⁹*Fern G. M. Co. v. Murphy*, 7 F.2d 613, 5 Alaska Federal Reports 275, 277;

Ketchikan L & S Co. v. Walker, 15 F.2d 722, 5 Alaska Federal Reports 321, 325.

THE ALASKA INDUSTRIAL BOARD HAD NO JURISDICTION TO MAKE ITS DECISION OF JANUARY 8, 1954 (R. 52), BECAUSE PETITIONER JENKINS TOOK NO APPEAL FROM THE BOARD'S DECISION AND AWARD OF FEBRUARY 6, 1953 (R. 46-47).

Petitioner Jenkins took no appeal within 30 days after February 6, 1953, as required by Sec. 43-3-22, ACLA 1949, or at all.

"... An award by the full Board shall be conclusive and binding as to all questions of fact; but either party to the dispute, within 30 days from the date of such award, if the award is not in accordance with law, may bring injunction proceedings, mandatory or otherwise, against the Industrial Board, to suspend or set aside in whole or in part, such order or award. Such proceedings shall be instituted in the United States District Court for the District in which the injury occurred."

Sec. 43-3-22, ACLA 1949.

Respondents submit that "No compensation for total temporary disability is thereafter payable" constitutes a finding by the Board and is conclusive and binding upon the Board and the Courts; but, if it constitutes a conclusion or a decree of law, it became final 30 days after February 6, 1953, no appeal from it having been taken to the District Court.

Nonetheless, the Board more than eleven months later on January 8, 1954 (R. 52), modified and reversed its decision and award of February 6, 1953, when it said: "The Full Board finds a condition of temporary total disability existed on October 29, 1950" (R. 52), which is diametrically opposed to its

previous decision of February 6, 1953, that "No compensation for total temporary disability is payable after" October 28, 1950 (R. 47).

The statute nowhere authorizes or empowers the Board to so modify and reverse its own previous decision and award.

Such procedure would lead to litigation never ending, or as said by the late Alaska District Judge Folta in referring to Sec. 43-3-4, ACLA 1949, viz.:

"In the face of this provision, it would seem that the case falls within the rule that the express mention of one thing is the implied exclusion of another. But perhaps there is a more cogent reason for holding that the power does not exist by implication. There must be an end to litigation."

Suryan v. AIB, 12 Alaska Reports 571, 573.

Moreover, "The right of appeal from proceedings involving an award of workmen's compensation is statutory and is governed by the particular provisions of the act involved."

Workmen's Compensation, 58 Am. Jur. 899,

Par. 534, id. 901; Par. 526;

Nash v. Douglas Aircraft Co., 214 F.2d 919
(Oklahoma.)

The 30-day limitation to appeal in Sec. 43-3-22, ACLA 1949, is useless legislation if, without Petitioner Jenkins having taken an appeal from the decision and award of February 6, 1953 (R. 46-47), the Board can reopen the case on January 8, 1954 (R. 52), and reverse its previous decision and award.

The Full Board made the decision and award of February 6, 1953 (R. 46-47), specifically finding that Jenkins "suffered temporary total disability during the period September 21, 1950, to October 28, 1950," and "On approximately October 28, 1950, . . . suffered a total permanent disability," and "His condition having been rated as a total permanent disability on that date, no compensation for total temporary disability is thereafter payable."

The quoted findings of the Board in its decision and award of February 6, 1953 (R. 46-47), necessarily preclude the finding in its decision and award of January 8, 1954 (R. 52), that "a condition of temporary total disability existed on October 29, 1950, and continues to this date, no end medical result having been reached."

The later finding is not authorized by any law, and if such a practice were allowed there would be no end to any compensation litigation, and in the remote future Jenkins could contend that the Board had authority to make other findings different from those in its decision and award not only of February 6, 1953, but of January 8, 1954.

THE ALASKA INDUSTRIAL BOARD HAD NO JURISDICTION TO MAKE ITS DECISION OF JANUARY 8, 1954 (R. 52), BECAUSE PETITIONER JENKINS FILED NO CLAIM FOR TEMPORARY DISABILITY COMPENSATION FROM AND AFTER OCTOBER 29, 1950, WITHIN TWO YEARS AFTER HIS INJURY ON SEPTEMBER 21, 1950 (R. 3, 39).

Petitioner Jenkins' Application of November 21, 1953, was filed with the Board on or about November 23, 1953 (R. 48-49). Jenkins' letter of May 14, 1953 (R. 21-22), to Board Chairman Benson was presumably filed about May 14, 1953. Jenkins' affidavit of December 16, 1953 (R. 24-26), was presumably filed with the Board about December 17, 1953.

Assuming without conceding that any one or more of them constituted a claim, none of them was filed with the Board within two years of Jenkins' injury on September 21, 1950, as required by Sec. 43-3-29, ACLA 1949, which statute is one of limitation.

Section 43-3-29 reads:

"Claims; Limitation. Any and all claims for compensation hereunder shall be barred unless a claim for compensation shall be filed with the Industrial Board within two years after the injury, or, if death results therefrom, within two years after such death, after the injury was sustained, or, in the event of mental incapacity, within two years after the removal of such mental incapacity."

Section 43-3-29, supra, is an absolute bar to the right to compensation, not a limitation upon the remedy.

The language of this section is substantially identical with the language of Section 2189, CLA 1933, under the former act; reading:

"Any and all claims for compensation hereunder shall be barred unless an action for the recovery of the same shall be commenced within two years after the cause of action accrued, or, in the event of mental incapacity, within two years after the removal of the mental incapacity."

In construing that act, the United States Court of Appeals for the Ninth Circuit said:

"It is contended by appellant that appellee's conduct amounted to fraud and resulted in the tolling of the statute of limitations,"

This contention must be rejected. Section 29 (Section 2189, supra) is more than a statute of limitations. The limitation prescribed goes not merely to the remedy, but to the right of action created by the act. This right of action is wholly statutory and must be accepted with all the conditions and limitations which the act imposes. The requirement that the action be commenced within two years is a limitation upon the right, not a mere limitation upon the remedy. This requirement is absolute and unconditional. If the action is not commenced within two years, there is no right of action and pleas of ignorance, concealment, misrepresentations, and fraud are of no avail."

Hilty v. Fairbanks Exploration Co., 82 F.2d 77, 5 Alaska Federal Reports 818, 821-822.

In that decision this Court approvingly cited its former decision in *Rogulj v. Alaska Gastineau Mining Co.*, 228 F. 549, 5 Alaska Federal Reports 142, 145.

Clearly under those decisions Jenkins failed to sustain the burden of proof not only of filing his claim within two years of his injury on September 21, 1950, but also of giving notice within two years of their now alleged occurrence to Chugach of his injuries for which he now seeks temporary disability compensation commencing October 29, 1950.

Also see:

Ewing v. Risher, 176 F.2d 641, 644 (CCA 10);

Nash v. Douglas Aircraft Co., 214 P.2d 919 (Okla.).

Petitioner Jenkins after having been awarded the maximum total permanent disability compensation of \$8100.00 as well as temporary disability compensation of \$476.70 up to the date of his injury becoming on October 28, 1950, a total permanent disability, as found by the Board in its decision and award of February 6, 1953 (R. 46-47), now seemingly contends that under the particular subparagraph of Sec. 43-3-1 entitled "Temporary Disability" (Appendix, p. 10), he is entitled to temporary disability compensation commencing October 29, 1950, and thenceforward into the indefinite future. He ignores entirely the fact that this particular statutory provision does not apply to injuries causing temporary disability; it specifically restricts the injuries to "relating to cases other than temporary disability."

While the Act is to be construed liberally, liberality does not mean that the Act is to be construed harshly against the Respondents in disregard of its purpose to make certain to Jenkins that he will be equitably compensated for his loss of earning capacity and to make certain to Chugach that it will not be mulcted in huge damages as at common law. Under Petitioners' theory the whole value of the Act would be destroyed, viz.: certainty of compensation both to employer and employee; despite the Board's decision and award of February 6, 1953 (R. 46-47), that Jenkins suffered total permanent disability on October 28, 1950.

There is no statutory authority, either express or implied, in Sections 43-3-1. through 41, supra, that sustains the Board's decision and award of January 8, 1954 (R. 52), and its finding of "a condition of temporary total disability existed on October 29, 1950, and continues to this date, no end medical result having been reached" cannot be construed in any manner other than as setting aside and a modification of its decision and award of February 6, 1953 (R. 46-47), wherein it found that on October 28, 1950, Jenkins suffered a total permanent disability and that no temporary disability compensation was payable to him after that date.

There is no statutory authority authorizing the filing or presenting of Jenkins' Application of November 21, 1953 (R. 48-49), or its consideration by the Board, and it should have been stricken in accord-

ance with Respondents' Motion and Answer of December 9, 1953 (R. 50-51), before the Board.

THE ALASKA INDUSTRIAL BOARD HAD NO CONTINUING JURISDICTION ON JANUARY 8, 1954, TO AWARD TEMPORARY DISABILITY COMPENSATION FOR A PERIOD AFTER PETITIONER JENKINS HAD SUFFERED TOTAL PERMANENT DISABILITY.

Nor does Section 43-3-4 (Appendix, p. 18) confer such jurisdiction upon the Board because the last clause therein, reading: "provided, however, that no compensation under such increased rate shall be paid unless the disability entitling the employee thereto shall develop and claim be presented within three (3) years after the injury," controls the entire section including the Board's continuing jurisdiction, at any time and upon its own motion, to review any agreement, award, decision or order.

As stated no such claim was presented within three years of the accident from which the injury occurred on September 21, 1950 (R. 3, 39).

CONCLUSION.

WHEREFORE, Respondents submit:

1. This Honorable Court has no jurisdiction because the Alaska Industrial Board was without jurisdiction to make and enter its decision of January 8, 1954 (R. 52), and, being an inferior court, tribunal or board without jurisdiction, no Court can take jurisdiction thereof.

2. Should this Honorable Court hold that it has jurisdiction, then the majority opinion of the United States Court of Appeals for the Ninth Circuit (R. 85-97) should be affirmed.

Dated, Juneau, Alaska,
December 11, 1957.

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(Appendices A, B, C, D, E and F Follow.)

NOTE

Appendices A and B, pages 1 through 53, are
Appendices A and B, pages 1 through 53, of
Appellees' Brief in CA 9, No. 14,616.